

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN Re AVISTA CORP. SECURITIES  
LITIGATION

No. CV-02-328-FVS

ORDER

**THIS MATTER** came before the Court pursuant to the Defendant's Motion for Reconsideration, Ct. Rec. 150. The Court heard oral argument in this matter on October 6, 2005. The Plaintiffs were represented by Benjamin Schwartzman, Merrick Scott Rayle, and Thomas Grammar. Defendant was represented by David Jacobson, Donald Stone, and Michael Scott. The Court also received supplemental briefing from the parties after oral argument. The Court has reviewed that briefing and the entire file and is fully informed.

**I. BACKGROUND**

This is a class action for securities fraud against Defendant Avista Corporation<sup>1</sup> and some of its officers<sup>2</sup> (hereinafter Avista). Plaintiffs are individuals who purchased or sold shares of Avista stock between November 23, 1999, and August 13, 2002, (the "Class

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<sup>1</sup> It is alleged that at the times relevant to this action, Avista Corporation was the owner of Avista Capital, which owned Avista Energy, which was engaged in the purchase and sale of electricity.

<sup>2</sup> There are three individual defendants: Thomas M. Matthews, Gary Ely and Jon E. Eliason.

1 Period"). Plaintiffs bring this action under Sections 10(b) and  
2 20(a) of the Securities and Exchange Act of 1934 as amended (15  
3 U.S.C. § 78j(b) and 78t(a)) and Rule 10b-5 promulgated thereunder (17  
4 C.F.R. § 240.10b-5). On July 30, 2004, the Court entered an Order  
5 denying Avista's motion to dismiss Plaintiffs' Consolidated Amended  
6 Class Action Complaint ("CAC"). (Ct. Rec. 117). Pursuant to Federal  
7 Rule of Civil Procedure 60(b), Avista now seeks reconsideration of  
8 that Order and moves to Dismiss the CAC.

## 9 **II. DISCUSSION**

### 10 **A. Legal Standards**

#### 11 1. Motion for Reconsideration

12 It is within the Court's discretion to reconsider its July 30,  
13 2004, Order Denying Motion to Dismiss. *School Dist. No. 1J,*  
14 *Multnomah County, OR v. AcandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir.  
15 1993). "Reconsideration is appropriate if the district court (1) is  
16 presented with newly discovered evidence, (2) committed clear error  
17 or the initial decision was manifestly unjust, or (3) if there is an  
18 intervening change in controlling law." *Id.*

19 Reconsideration is appropriate in this case because the recent  
20 United States Supreme Court decision in *Dura Pharmaceuticals, Inc. v.*  
21 *Broudo*, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), reversed Ninth  
22 Circuit case law regarding what is required to withstand a motion to  
23 dismiss under Section 10(b) of the Securities and Exchange Act with  
24 respect to pleading loss causation. Therefore, the Court grants  
25 Avista's motion to reconsider.

26 //

1           2.    Motion to Dismiss

2           Avista's motion for reconsideration moves the Court to dismiss  
3   the CAC with prejudice for failure to state a claim under Federal  
4   Rule of Civil Procedure 12(b)(6) on the basis that it fails to  
5   adequately plead loss causation. "Generally, a complaint should not  
6   be dismissed for failure to state a claim upon which relief may be  
7   granted under Rule 12(b)(6) unless it "appears beyond doubt that the  
8   plaintiff can prove no set of facts in support of his claim which  
9   would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46,  
10   78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Johnson v. Knowles*, 113  
11   F.3d 1114, 1117 (9th Cir. 1997). All factual allegations set forth  
12   in the complaint are taken as true and construed in the light most  
13   favorable to the plaintiff. *Epstein v. Wash. Energy Co.*, 83 F.3d  
14   1136, 1140 (9th Cir. 1996). "[F]actual challenges to a plaintiff's  
15   complaint have no bearing on the legal sufficiency of the allegations  
16   under Rule 12(b)(6)." *Lee*, 250 F.3d at 688. The Court must give the  
17   plaintiff the benefit of every inference that reasonably may be drawn  
18   from well-pleaded facts. *Tyler v. Cisneros*, 136 F.3d 603, 607 (9th  
19   Cir. 1998). However, it is not "proper to assume that [a plaintiff]  
20   can prove the facts it has not alleged or that the defendants have  
21   violated [laws] in ways that have not been alleged." *Associated Gen.*  
22   *Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526,  
23   103 S.Ct. 897, 74 L.Ed.2d 723 (1983).

24           3.    Request for Judicial Notice

25   \_\_\_\_With its Motion for Reconsideration, Avista filed a Request for  
26   Judicial Notice (ARJN). (Ct. Rec. 153 ). Specifically, Avista

1 requests the Court take judicial notice of the following: seven  
2 documents from the Federal Energy Regulatory Commission (FERC)  
3 proceedings involving Avista (see ARJN Nos. 1-4; 6-8); the Court's  
4 July 30, 2004, Order Denying Motion to Dismiss (see ARJN No. 5);  
5 *Factiva*, a Dow Jones & Reuters Company Daily Stock Quotes for Avista  
6 Corp., dated November 1, 1999-June 8, 2005 (see ARJN No. 9); and  
7 *Factiva*, a Dow Jones & Reuters Company Dow Jones Utility Avg Opts  
8 Index, dated November 1, 1999 - June 8, 2005 (see ARJN No. 10).  
9 Plaintiffs only object to ARJN No. 10. For the reasons stated below,  
10 the Court grants Avista's Request for Judicial Notice.

11 "Courts may only take judicial notice of adjudicative facts that  
12 are not subject to reasonable dispute." *United States v. Ritchie*,  
13 342 F.3d 903, 908-09 (9th Cir. 2003) (citing Fed.R.Evid. 201(b)).  
14 "Facts are indisputable, and thus subject to judicial notice, only if  
15 they either 'generally known'...or capable of accurate and ready  
16 determination by resort to sources whose accuracy cannot be  
17 questioned[.]" *Id.* at 909. ARJN No. 10 charts daily prices for  
18 Avista stock and the Dow Jones Utility Average ("DUX") between  
19 November 1, 1999, and June 9, 2005, and that the DUX is a publicly  
20 available price-weighted index of the fifteen largest, most liquid  
21 New York Stock Exchange-listed utility stocks. Plaintiffs object to  
22 the Court taking judicial notice of this exhibit on the basis that it  
23 is "not indisputable," but they do not elaborate and do not cite any  
24 authority supporting their objection. Further, Plaintiffs  
25 acknowledge that many circuits hold that taking judicial notice of  
26 well-publicized stock prices and general market trends is permissible

1 in a motion to dismiss.

2 ARJN No. 10 appears to be the type of documents readily capable  
3 of judicial notice. See e.g., *Ganino v. Citizens Utilities Co.*, 228  
4 F.3d 154, 167 n. 8 (2d Cir. 2000) (judicially noticing stock prices  
5 is proper in a motion to dismiss); *D.E. & J. Ltd. P'ship v. Conaway*,  
6 284 F.Supp.2d 719, 749 (E.D. Mich. 2003) (taking judicial notice of  
7 the general decline in the stock market during the class period when  
8 considering the sufficiency of plaintiffs' loss causation pleading on  
9 a motion to dismiss); *In re Acterna Corp. Sec. Litig.*, - F. Supp. 2d  
10 - , 2005 WL 1750268 (D. Md. Jul. 26, 2005) (taking judicial notice in  
11 a motion to dismiss of the Dow Jones U.S. Telecommunications Index,  
12 which evidenced a general decline in the telecommunications market  
13 during the class period); *Keithley Instruments Inc. Sec. Litig.*, 268  
14 F. Supp. 887 (N.D. Ohio, 2002) (taking judicial notice in a motion to  
15 dismiss of the stock prices of the defendant's primary competitor,  
16 the NASDAQ composite, and the Dow Jones Semiconductor Index over the  
17 period in question). Therefore, the Court grants ARJN of No. 10.  
18 For the same reasons, the Court grants ARJN of No. 9 and takes  
19 judicial notice of the Dow Jones Stock Quotes for Avista stock.  
20 However, the Court is not convinced that either of these documents  
21 are material to the issue before the Court. Further, the Court takes  
22 judicial notice of the documents from the FERC proceedings (ARJN Nos.  
23 1-4 & 6-8), but only for the purpose of establishing those documents'  
24 existence and contents, not for the purposes of assuming the truth of  
25 the matters asserted therein, and the Court's July 30, 2004, Order  
26 Denying Motion to Dismiss (ARJN No. 5).

**B. Pleading Requirement for Claims Under Section 10(b) and Rule 10b-5**

To state a claim for securities fraud under Section 10(b) of the Securities and Exchange Act and Rule 10b-5, a plaintiff must allege a material misrepresentation (or omission), scienter (i.e. a wrongful state of mind), a connection with the purchase or sale of a security, reliance, economic loss, and loss causation. *Dura Pharmaceuticals*, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005).

**1. Falsity and Scienter**

Plaintiffs' allegations center on Avista's alleged public representations that Avista had adopted comprehensive risk management procedures and controls over its energy trading. For example, Plaintiffs allege Avista made misrepresentations in its 10-K Annual Reports filed with the SEC in 1999, 2000, 2001 and 2002, indicating it was adopting strong risk management controls and procedures, and comprehensive monitoring of its risk management. Instead, Plaintiffs allege Avista's upper management, including the individual defendants in this action, did not implement or monitor risk management controls and procedures. Plaintiffs allege Avista's November 23, 1999 press release and 1999 10-K Form represented that Avista was moving toward lower-risk regionally based energy trading practices backed by physical assets. Instead, according to the Plaintiffs, Avista knowingly engaged in repeated high-risk Enron trading schemes.

Avista's original motion to dismiss sought to dismiss the CAC on the basis that these allegations were insufficient to satisfy the heightened pleading standards for falsity and scienter under the PSLRA (Private Securities Litigation Reform Act). The Court denied

1 the motion, finding the CAC, when taken as a whole, pled facts  
2 sufficient to create a strong inference that Avista made false or  
3 misleading statements with conscious or deliberate recklessness,  
4 satisfying the heightened pleading requirements regarding false or  
5 misleading statements and scienter.

6 2. Loss Causation

7 Avista now moves to dismiss the CAC on the ground that  
8 Plaintiffs have not adequately pled loss causation. A securities  
9 fraud plaintiff must plead and prove loss causation, which is "a  
10 causal connection between the material misrepresentation and the  
11 loss." *Dura Pharmaceuticals*, 125 S.Ct. at 1631 (citing 15 U.S.C. §  
12 78u-4(b)(4)). Loss causation is "equivalent to proximate causation  
13 in tort." *Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999).  
14 Prior to the Supreme Court's decision in *Dura Pharmaceuticals*, a  
15 plaintiff claiming securities fraud under Section 10(b) and Rule 10b-  
16 5 could plead causation by merely alleging and ultimately proving  
17 that the price of the security on the date of the purchase was  
18 artificially inflated because of the defendant's misrepresentation.  
19 See *Dura Pharmaceuticals, Inc. v. Broudo*, 339 F.3d 933, 938 (9th Cir.  
20 2003). However, the Supreme Court, noting that the Ninth Circuit's  
21 rule contravened that of several other circuits, found that such a  
22 rule fails to ensure actual causation in all cases. *Dura*  
23 *Pharmaceuticals*, 125 S.Ct. at 1630-31. The Supreme Court concluded a  
24 securities fraud plaintiff must do more than allege purchase price  
25 inflation. Additionally, the plaintiff must allege facts that show  
26 the misrepresentations alleged in the complaint proximately caused

1 the alleged economic loss. *Id.* at 1634.

2 Here, Plaintiffs allege they were damaged in that they paid  
3 market prices for Avista stock which were artificially inflated by  
4 Avista's violations of the federal securities law. CAC, ¶ 2. On its  
5 own, this allegation is insufficient to plead loss causation. See  
6 *Dura Pharmaceuticals*, 125 S.Ct. at 1630 (finding that securities  
7 fraud complaint failed to state a claim under Section 10(b) because  
8 the complaint alleged nothing more than that the plaintiffs suffered  
9 damages because they paid artificially inflated prices for the  
10 securities). Beyond the allegations of artificial inflation, there  
11 are really only two paragraphs in the CAC that allege economic loss.  
12 Plaintiffs allege they were damaged in that the FERC's announcement  
13 of its Show Cause Order and Initiating Order caused the price of  
14 Avista stock to drop. See CAC ¶¶ 14, 15.

15 On June 5, 2002, the FERC ordered Avista to show cause why its  
16 authority to sell electricity at market-based rates should not be  
17 revoked. This Show Cause Order was issued after Avista allegedly  
18 failed to comply with its investigation into Avista's electricity  
19 trades. On August 14, 2002, FERC announced a possible enforcement  
20 action against Avista (Initiation Order). When news of the orders  
21 became public, Plaintiffs allege Avista's stock plummeted.  
22 Plaintiffs argue the CAC enumerates the loss claimed by specifying  
23 the decline in stock price on particular dates. Plaintiffs also  
24 argue the CAC enumerates loss causation by alleging that the losses  
25 occurred when "the truth about Avista began to be revealed" through  
26 the FERC proceedings. This is insufficient to adequately plead loss



1 causation because the CAC does not allege facts showing the drops in  
2 Avista's stock price following the announcement of the FERC orders  
3 were *caused by* disclosure of Avista's alleged *misrepresentations*. In  
4 fact, Plaintiffs specifically contend Avista's alleged  
5 misrepresentations *have not* been disclosed, stating "[t]he facts  
6 still have not been disclosed by defendants to the public." CAC, ¶14.

7           a. *To adequately plead loss causation, Plaintiffs*  
8           *must show the FERC Orders revealed some of*  
9           *Avista's alleged fraud to the public.*

10           In *Dura Pharmaceuticals*, the complaint failed because it did not  
11 allege "that Dura's share price fell significantly after the truth  
12 became known...." *Dura Pharmaceuticals*, 125 S.Ct. at 1634.  
13 Therefore, to plead loss causation a securities fraud plaintiff must  
14 allege a disclosure of the alleged fraud to the public. See e.g., *In*  
15 *re Daou Systems, Inc. Sec. Litig.*, 411 F.3d 1006 (9th Cir. 2005)  
16 (plaintiffs' economic loss occurred *after* "defendants began to reveal  
17 figures showing the company's true financial condition"); *In re*  
18 *Acterna Corp. Sec. Litig.*, - F.Supp.2d, 2005 WL 1750268, \*22 (D. Md.  
19 Jul. 26, 2005) ("in *Dura*, the Supreme Court not only endorsed, but  
20 made controlling what had developed in the lower courts as the  
21 majority view:...loss causation requires the plaintiff to point to  
22 some causal link between the alleged misrepresentations and an  
23 economic loss suffered by the plaintiff. 'The most common "causal  
24 link" pled under this rule is a showing that the plaintiff suffered  
25 an economic loss fairly attributable to the public airing of the  
26 alleged fraud, i.e., a significant stock price decline immediately  
following the announcement that reveals the fraud to the public.'")

1 (quoting *D.E. & J. Ltd. P'ship v. Conaway*, 284 F.Supp.2d 719, 748-49,  
2 *aff'd*, 2005 WL 1386448 (6th Cir. June 10, 2005); *Fraternity Fund Ltd.*  
3 *v. Beacon Hill Asset Management LLC*, 376 F.Supp.2d 385, 403 (S.D.N.Y.  
4 2005) (holding that loss causation requires "'both that the loss be  
5 foreseeable and that the loss be caused by the materialization of the  
6 concealed risk.'") (citing *Lentell v. Merrill Lynch & Co.*, 396 F.3d  
7 161, 174 (2d Cir. 2005)). Because Plaintiffs allege they have  
8 adequately plead loss causation by pointing to the FERC Orders to  
9 establish that Avista's alleged misrepresentations and omissions  
10 caused Plaintiffs' alleged losses, the FERC Orders must disclose the  
11 alleged fraud to the public.

12 *b. The FERC Orders are not corrective disclosures.*

13 In its previous Order denying Avista's original motion to  
14 dismiss, the Court summarized Avista's alleged fraud as three-fold:  
15 alleged misrepresentations of Avista Energy's business focus in 1999  
16 press release; alleged misrepresentations of Avista's risk management  
17 policies and procedures, and alleged failure to disclose illegal,  
18 Enron-related trading practices. The Court determines that  
19 Plaintiffs fail to allege loss causation because the two FERC orders  
20 do not contain factual information that reveals any of these  
21 misrepresentations or reveals any fraud by Avista.

22 November 23, 1999 Press Release. Plaintiffs allege that in  
23 1999, Avista misrepresented that Avista Energy intended to change its  
24 business focus from national energy trading to a regionally based  
25 trading effort backed by physical assets. However, Plaintiffs do not  
26 allege that the FERC orders made these misrepresentations public. In

1 fact, neither the Show Cause Order nor the Initiating Order addresses  
2 Avista Energy's business focus in 1999 or whether it was redirected  
3 from a national to a regional effort. Nor does the order contradict  
4 that Avista intended to support Avista Energy's business operations  
5 in the Western region with contracts or physical assets, or that it  
6 failed to do so. The FERC Initiating Order indicates the FERC  
7 investigation would include both Avista Corporation and Avista  
8 Energy. However, this reference does not communicate any factual  
9 information about Avista Energy to the market. More specifically, it  
10 does not communicate to the market that in 1999 Avista Energy did not  
11 change its business focus from a national to a regional focus.  
12 Therefore, neither the FERC Show Cause Order or Initiating Order are  
13 sufficient to show a causal link between the alleged  
14 misrepresentation about Avista Energy in 1999 and any economic loss.

15 Risk Management Allegations. Plaintiffs allege Avista  
16 represented from 1999 through 2001 that it had a risk management  
17 policy, when in fact it did not, or any policy it had was  
18 ineffective. See CAC, ¶¶ 43-44. Neither of the two FERC Orders  
19 mention Avista's risk management policy or procedures. Therefore,  
20 the allegation that the announcements of these orders caused Avista's  
21 stock price to drop does not show a causal link between the alleged  
22 misrepresentation of Avista's risk management from 1999 through 2001  
23 and the loss of market value in Avista stock.

24 Avista's Alleged Manipulative Energy Trading. Plaintiffs allege  
25 Avista failed to disclose it had engaged in energy market  
26 manipulation. The Show Cause Order and the Initiating Order

1 disclosed to investors that the FERC believed Avista had not  
2 cooperated in its investigation, that it might have manipulated the  
3 energy market, and that the FERC intended to investigate the matter.  
4 However, the announcement by a regulatory agency that it intends to  
5 investigate is insufficient, on its own, to plead loss causation.  
6 Since the orders did not reveal any factual information showing  
7 Avista illegally manipulated the energy market or made factual  
8 misrepresentations, the FERC Orders do not provide a basis for  
9 asserting a causal relationship between Avista's alleged failure to  
10 disclose it manipulated the energy markets and Plaintiffs' alleged  
11 economic loss.

### 12 **III. CONCLUSION**

13 For the reasons discussed above, the Court concludes the CAC  
14 does not allege requisite causal nexus between Avista's alleged  
15 misrepresentations and the economic harm allegedly suffered by  
16 Plaintiffs. Therefore, Plaintiffs have not adequately plead loss  
17 causation. Accordingly,

18 **IT IS HEREBY ORDERED** that Avista' Motion for Reconsideration,  
19 **Ct. Rec. 150**, is **GRANTED**: Plaintiffs' CAC is **DISMISSED WITH LEAVE TO**  
20 **AMEND**. Plaintiffs shall have 14 days from the filing of this Order  
21 to file a Second Consolidated Amended Class Action Complaint.

22 **IT IS SO ORDERED**. The District Court Executive is hereby  
23 directed to enter this Order and furnish copies to counsel.

24 **DATED** this 19th day of October, 2005.

25  
26 s/ Fred Van Sickle  
Fred Van Sickle  
United States District Judge